

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-1116

B
P/S

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

MICHAEL ZILBERBERG,

Appellant.

*On Appeal from the United States District Court for the Eastern
District of New York*

APPELLANT'S APPENDIX

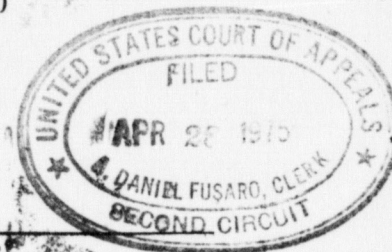
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DOCKET ENTRIES

74CR 375

NEAHER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: D. DePetris
MICHAEL ZILBERBERG	
	For Defendant: Robert J. Lazarus
	16 Court St.- B'klyn, New York
	855-2200

CLOSED

Mail fraud- use of a fictitious name or address in the mails

ABSTRACT OF COSTS	AMOUNT	DATE	NAME	CASH RECEIVED AND DISBURSED	
				RECEIVED	DISBURSED
Fine,		3-14-74	Notice of Appeal	5 -	
Clerk,		3-17-74	Pay to Trial		5 -
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
5-14-74	Before WEINSTEIN, J.- Indictment filed
5-17-74	Notice of appearance filed
5-17-74	Govts Notice of Readiness for trial filed
5-17-74	Before WEINSTEIN J - case called, deft & counsel Robert Lazarus present - deft arraigned and enters a plea of not guilty - bail set at \$2500 P.B. -case adjd without date.
8-5-74	Notice of motion for and order dismissing the indictment and memorandum of law filed
8-15-74	Before Neaheer, J - case called - adjd to 8-16-74, @ 11:00 am.
8-16-74	Before NEAHER, J - case called - deft not present counsel Robert Lazarus present - set for trial for 11-4-74 at 10:00 am.

74CR 375

2a

DATE	PROCEEDINGS
10-9-74	Govts Memorandum filed in opposition to defts motion pursuant to Rule 12, etc.
11-4-74	Before NEAHER, J - case called - deft & atty Robert Lazarus present. Case set down for Jan. 6, 1975 for trial.
1-7-75	Before NEAHER, J - case called - deft & counsel Robert Lazarus present - application was made by AUSA Lazarus for dismissal of the indictment - motion denied - answered ready - trial BEGUN - Jurors drawn and sworn - on application of AUSA Kimelman counts 1,3,4,6,7,11,16, 16, 17, 19, 20 and 24 are dismissed before Trial - Deft moves for a mistrial - motion denied - trial to be contd on Jan. 8, 1975.
1-8-75	Before NEAHER, J - case called - deft & counsel present - trial resumed - Deft moves for withdrawal of Juror and Mistrial - denied - Trial to be contd to Jan. 9, 1975.
1-7-75	Before NEAHER, J.- Case called- Deft and counsel present- Trial resumed- Alternate juror no. 2 reported ill- on motion of deft for order of dismissal motion denied-Motion by deft for mistrial, etc.- motion denied- Motion by deft for judgment of acquittal- decision reserved- deft rests- Court charges jury-Jury retires to deliberate-Jury returns and renders a verdict of guilty as to counts 2,5,8,9,10,12,13,15,18,21,22,23,25, and 26- Jury polled- Jury discharged- motions reserved at time of sentence- deft's brief to be served by 1/27/75- Deft contd on bail-sentence adjd without date
1-9-75	Jury verdict sheet filed
1-18-75	Magistrate's file 73 M 1622 inserted into CR file.
1-28-75	Before NEAHER, J.- Case called- Adj'd to 3/7/75
1-14-75	Govt's Memorandum of Law in Opposition to Deft's Rule 29(c) motion for a judgment of acquittal filed.
1-14-75	Before NEAHER, J - case called - deft & counsel Paul Lazarus present - deft is sentenced to 3 years probation on each of counts 2,5,8,9,10,12 and 13 pursuant to T-18, U.S.C. Sec. 1341 to run concurrent with sentence to the sentence imposed on remaining counts below pursuant to T-18:1342 on counts 15, 18, 21, 22, 23, 25 & 26. One year imprisonment on each count, to run concurrent. Execution of sentence stayed pending appeal. Bail fixed at \$5,000 personal recognizance bond.
1-14-75	Judgment & Commitment filed - certified copies to Marshal.
1-14-75	Notice of Appeal filed
1-14-75	Docket entries and duplicate of Notice mailed to Court of Appeals together with Form A.
1-14-75	Stenographic notes filed.

DATE

PROCEEDINGS

3/25/75 Stenographers Transcript dated 1/7/74 filed

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA

-against-

MICHOEL ZILBERBERG,

Defendant.

- - - - - X

THE GRAND JURY CHARGES:

INDICTMENT

Cr. No. 74CR375
(T. 18, U.S.C., §1341
and §1342)

5-14-74

NEAHER, J.

COUNTS ONE - THIRTEEN

1. On or about and between the 1st day of April 1971 and the 1st day of December 1972, as hereinafter set forth, within the Eastern District of New York, the defendant MICHOEL ZILBERBERG, knowingly and wilfully devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, from various companies and banks issuing credit cards in violation of Title 18, United States Code, §1341.

2. It was a part of said scheme and artifice to defraud and for the purpose of obtaining money and property by means of false and fraudulent pretenses, representations, and promises, that the defendant MICHOEL ZILBERBERG knowingly placed and caused to be placed in an authorized depository for mail matter, to be sent and delivered by the Post Office Department or United States Postal Service, applications for credit cards without revealing his true name and falsely using the name Charles Ross as the purported applicant for the aforementioned credit cards.

3. It was further a part of the said scheme and artifice to defraud that the defendant MICHOEL ZILBERBERG rented a Post Office Box under the name "Charles Ross" for the purpose of receiving and causing to be delivered by the Post Office Department or United States Postal Service the aforementioned credit cards for his own personal use.

4. In furtherance of the aforesaid scheme and artifice to defraud, the defendant MICHOEL ZILBERBERG received said credit

cards through the United States Mails as hereinafter set forth on the following approximate dates:

5a

<u>COUNT</u>	<u>DATE</u>	<u>CREDIT CARD</u>
D 1	April 1, 1971	Trans World Airlines, Inc. Credit Card No. 1511063792
2	April 12, 1971	Manufacturers Hanover Trust Company Master Charge Credit Card No. 171306605204
D 3	April 15, 1971	Avis Credit Card No. 74003183738
D 4	April 20, 1971	Sun Oil Corp. Credit Card No. 74092987978
5	August 2, 1971	Amer. Airlines Credit Card No. 351152915
D 6	August 2, 1971	Getty Oil Co., Inc. Credit Card No. 2740358482
D 7	August 2, 1971	Texaco Inc. Credit Card No. 3363420393
8	August 5, 1971	BankAmericard No. 132689407
9	August 6, 1971	Mobile Oil Corp. Credit Card No. 8836986334
10	August 20, 1971	Gulf Oil Corp. Credit Card No. 221228663-3
D 11	August 20, 1971	Humble Oil & Refining Company Credit Card No. 3216241053
12	September 23, 1971	Standard Oil - Chevron Credit Card No. 9383200005
13	December 27, 1971	Diners' Club Credit Card No. 174303040

COUNTS FOURTEEN - TWENTY-SIX

1. The Grand Jury incorporates by reference and realleges the same herein all of the allegations contained in paragraphs one through three of the first thirteen counts of this indictment.

2. On or about and between the 1st day of April 1971 and the 1st day of December 1971, as hereinabove set forth, in the Eastern District of New York, the defendant MICHOEL ZILBERBERG,

for the purpose of conducting, promoting and carrying on by means of the Post Office Department or United States Postal Service the aforesaid scheme and device to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, did use and assume a fictitious, false and assumed name, that is, the name "Charles Ross" on the approximate dates set forth in Counts One through Thirteen. (Title 18, United States Code, Section 1342)

A TRUE BILL

FOREMAN

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Summation by Mr. Kimelman

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1
2 have to worry about is that this defendant believed
3 that he was above the law. He saw the opportunity
4 to engage in a scheme that you and I can't because
5 that would be breaking the law. The evidence has
6 been before you for the last three or four days.

7 As I stated before, the exhibits are here
8 before you, the handwriting analysis, the Al Gordon
9 signatures, all of the allegations, all of the
10 charges. I am sure if you examine each of them
11 that there will be no doubt in your mind that this
12 defendant is guilty. I think you.

13 THE COURT: Members of the jury, we are now
14 at the stage of trial where you are about to under-
15 take your final function as jurors.

16 Your duty is a serious and important one; in
17 performing it, you actively share with the Court the
18 responsibility of administering justice according
19 to law and the evidence in the case.

20 Your oath as jurors obliges you to apply
21 this final charge in an attitude of complete fair-
22 ness and impartiality and was emphasized by me when
23 you were selected as jurors, without bias or pre-
24 judice for or against the Government or against the
25 defendant as parties to this controversy.

1 This case has been of relatively short dura-
2 tion. The fact that that has been so in no way
3 reflects importance. Every case, whether it takes
4 a day, a week or a month, is important. A case is
5 important to the Government since the enforcement of
6 the laws is of prime importance to the community.
7 Obviously, it is equally important to the defendant,
8 who is charged with a serious crime and has the right
9 to receive a fair trial.

10 The community has an interest in that, too,
11 but let me add the fact that the Government is a
12 party entitles it to no greater consideration than
13 that accorded to any other party to a litigation.
14 By the same token, it is entitled to no less con-
15 sideration. All parties, Government and individuals
16 alike, stand as equals before the bar of justice.

17 Your final role is to decide and pass upon
18 the fact issues in the case.

19 You are the sole and exclusive judges of the
20 fact. You determine the weight of evidence. You
21 appraise the credibility of the witnesses, you draw
22 the reasonable inferences from the evidence. You
23 resolve such conflicts as they may be in evidence.
24 I shall later refer to how you determine the
25 credibility of witnesses.

Charge of the Court

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1
2 My final function is to instruct you as to
3 law, and it is your duty to accept these instruc-
4 tions as to the law and to apply them to the facts
5 as you may find them.

6 With respect to any fact matter, it is your
7 recollection, and yours alone, that governs.

8 As I told you, anything that counsel, either
9 for the Government or the defense, may have said
10 with respect to matters in evidence, whether during
11 the trial, in a question, in arguments or in summa-
12 tion, is not to be substituted for your own recollec-
13 tion of the evidence.

14 So, too, anything the Court may have said
15 during the trial or maybe referred to during the
16 course of these instructions as to any matter in
17 evidence is not to be taken in lieu of your own re-
18 collection.

19 There are certain principles of law which
20 apply in every criminal case to which I made re-
21 ference and emphasized at the time of your selec-
22 tion as jurors, I repeat them now.

23 The indictment is merely an accusation, a
24 charge. It is no evidence of proof of a defen-
25 dant's guilt. The defendant on trial has pleaded

1 not guilty, thus the Government has the burden of
2 proving the charges against the defendant beyond a
3 reasonable doubt. He does not have to prove his
4 innocence. On the contrary, he is presumed to be
5 innocent of the accusations contained in the indict-
6 ment.
7

8 This presumption of innocence was in his
9 favor at the start of the trial, continued in his
10 favor throughout the entire trial; is in his favor
11 even as I instruct you now and remains in his favor
12 during the course of your deliberations in the jury
13 room. It is removed only if and when you are
14 satisfied that the Government has sustained its
15 burden of proving the guilt of the defendant beyond
16 a reasonable doubt.

17 The question that naturally comes up is what
18 is a reasonable doubt. The words almost define
19 themselves; that there is a doubt founded on reason
20 and arising out of the evidence in the case, or the
21 lack of evidence. It is a doubt which a reasonable
22 person has after carefully weighing all the evidence.

23 Reasonable doubt is a doubt which appeals to
24 your reason, your judgment, your common sense and
25 your experience. It is not caprice, a whim,

Charge of the Court

109

1
2 conjecture or suspicion. It is not an excuse to
3 avoid the performance of an unpleasant duty. It is
4 not sympathy for a defendant.

5 If, after a fair and impartial consideration
6 of all the evidence, you candidly and honestly say
7 you are not satisfied of the guilt of the defendant,
8 that you do not have an abiding conviction of his
9 guilt in sum, if you have such a doubt as would
10 cause you as prudent persons to hesitate before
11 acting in matters of importance to yourself, then
12 you have a reasonable doubt and in that circumstance
13 it is your duty to acquit.

14 On the other hand, if, after such an impar-
15 tial and fair consideration of all the evidence, you
16 can candidly and honestly say you do have an abiding
17 conviction of a defendant's guilt, such a conviction
18 as you would be willing to act upon in important and
19 lay matters, personal affairs of your own life, then
20 you have no reasonable doubt and, under such circum-
21 stances, it is your duty to convict.

22 One final word on this subject. A reasonable
23 doubt does not mean a positive certainty or beyond
24 all possible doubt; if that were the rule, few per-
25 sons however guilty would be convicted. It is

1
2 practically impossible for a person to be absolutely
3 and completely convinced of any controverted fact
4 which might by its nature be not acceptable of
5 mathematical certainty. In consequence, the law in
6 a criminal case is that it is sufficient if the
7 guilt of a defendant is established beyond a reason-
8 able doubt, not beyond all possible doubt.

9 Now, let us turn to the laws referred to in
10 the indictment. You will recall that the indictment
11 charges the defendant with several violations of two
12 federal criminal statutes. Section 1341 and 1342
13 of Title 13, United States Code. These statutes
14 were enacted by Congress to prevent the use of
15 United States mail as a means of carrying out or even
16 attempting to carry out fraudulent schemes or con-
17 duct fraudulent schemes. Thus, Section 1341 makes
18 it a crime for anyone to place "in any post office
19 or authorized deposit for mail matter, any matter or
20 thing whatever to be sent or delivered by the Post
21 Office Service, take or receive therefrom any matter
22 or thing," where that is done for the purpose of
23 executing any scheme or artifice to be fraud or for
24 obtaining money or property by means of false or
25 fraudulent pretenses.

1
2 Section 1342 makes it a separate criminal
3 offense for a person to use or assume or request the
4 address -- and I quote, "Any fictitious, false or
5 assumed title, name, or address or name other than
6 his own proper name." Or to take or receive from
7 any post office or authorized depot or mail matter;
8 and I quote again, "any letter, postal card, package
9 or other mail matter addressed to any other ficti-
10 tious, false or assumed title, name or address, or
11 name other than his own proper name."

12 Where this done for the purpose of conducting,
13 promoting or carrying on by the use of the mails,
14 any scheme or device referred to in Section 1341.
15 That means, of course, any scheme or device to de-
16 fraud someone or to obtain money or property by means
17 of false or fraudulent pretenses.

18 In my discussion of these laws, you will note
19 the three essential elements emerge. One, a scheme
20 to defraud; two, an intentional use of the mails by
21 the schemer, or to have someone else use the mails
22 in connection with that scheme; and, three, a
23 specific intention on the part of the schemer to
24 defraud, that is to do wrong.

25 The statute refers to any scheme or artifice

1
2 to defraud or for obtaining money or property by
3 means of false or fraudulent pretenses, representa-
4 tion or promises.

5 What do these terms mean? The word scheme
6 is to be given its ordinary meaning, that is, a plan
7 or design to be followed to accomplish some object
8 or purpose. Here to defraud or to obtain money or
9 property by means of false or fraudulent pretenses
10 or representations. Since the word scheme con-
11 notes a plan of a more comprehensive or perhaps
12 extensive nature, the statute also uses the term
13 "artifice," so even a single instance of the use of
14 the mails to swindle someone out of money or
15 property by subterfuge, trickery or deceit would
16 suffice to violate the law.

17 The term "defraud" is also used in its ordinary
18 sence, that is, deceit or trickery with intention to
19 gain some dishonest advantage. The terms "fraudu-
20 lent representations or promises" mean the making of
21 statements, whether oral or written, which are false
22 in fact and known to be such.

23 In this case, the indictment charges that the
24 scheme or artifice to defraud and to obtain money
25 and property by false or fraudulent means consisted

1 of a plan, device, by the defendant to submit ap-
2 plications to various credit card companies or banks,
3 using a false name and supplying other false repre-
4 sentations concerning them for the purpose of ob-
5 taining credit cards, all with the intention of later
6 using such credit cards for goods and services for
7 which he did not intend to pay.
8

9 The Government alleges seven separate in-
10 stances in which the defendant applied for and
11 received credit cards in the period from April until
12 December, 1971. Since each alleges use of the mails
13 in connection with these instances constitutes a
14 separate and distinct violation of Section 1341.
15 The indictment has set them forth in seven separate
16 counts numbered 2, 5, 8, 9, 10, 12 and 13.

17 I am not going to spell them out for you,
18 since all I am saying is that each of those counts
19 represents a separate card issued on a separate date,
20 which you recall the subject of testimony from
21 various witnesses who appeared before you. Also
22 since in each of the instances I have referred to
23 and the counts numbered above, the defendant al-
24 legedly used fictitious, false or assumed name of
25 Charles Ross.

1
2 There are seven counts of the separate viola-
3 tions of Section 1342, namely Count 15, 18, 21, 22,
4 23, 25 and 26. Again simply a list of dates and the
5 name used in connection with each of the seven cards
6 which were the subject of the testimony. I instruct
7 you for the purpose of the statute, a credit card is
8 proper within the meaning of the statute and is a
9 means by which goods or services may be obtained on
10 credit without further identification.

11 Now, I have told you that the Government has
12 the burden of proving the charges against the defen-
13 dant beyond a reasonable doubt. What must the
14 Government prove in this case?

15 In order to convict the defendant, the Govern-
16 ment must establish beyond a reasonable doubt the
17 following three essential elements. First, that this
18 defendant devised a scheme or artifice to defraud by
19 obtaining the issuance of credit cards by means of
20 false or fraudulent representations as to his true
21 identity, residence and other information as to his
22 financial worth, all with intent of using such cards,
23 when received, to obtain goods and services without
24 payment therefor.

25 Second, that he caused to be placed in an

1
2 authorized depository for mail matter a letter,
3 envelope, intended to be sent or delivered by the
4 Post Office Service to the credit card issuer.

5 Third, that the act of using the United States
6 mails was done wilfully and with the specific intent
7 to carry out some essential system in the execution
8 of the said scheme or artifice to defraud or attempt
9 to do so.

10 Now, in this case, as you know from what I
11 have said and indeed from what counsel pointed out
12 on their summation, the most important question you
13 will have to decide is what was the intent of the
14 defendant if you should find that he did the various
15 acts ascribed to him in the Government's evidence.

16 A man's intent is purely a matter of mind.
17 No one has ever been able to photograph it. How
18 then are you going to judge intent in this case?
19 Medical science has not yet devised an instrument
20 whereby we can go back to the time of the occurrence
21 of events and determine what then was a person's
22 intent or knowledge.

23 Nevertheless, it has been said that a man's
24 state of mind is as much a fact as the state of his
25 digestion and you tell it in the same way by the

1 way he acts. You will have to determine whether
2 this defendant knowingly and intentionally devised a
3 plan to fraudulently obtain credit cards, and
4 knowingly and intentionally used the mails to accom-
5 plish that plan entirely from his acts, his conduct
6 and surrounding circumstances and such inferences as
7 may reasonably be drawn therefrom.
8

9 There is very little direct evidence in this
10 case. Direct evidence is where a witness testified
11 to what he saw, heard and observed, and what he knows
12 of his own knowledge; that which comes to him by
13 virtue of his senses. The witness Barry Ash, of
14 the Pennsylvania Bank, identified the defendant as
15 Charles Ross and the defendant, through counsel, con-
16 ceded that he used that name.

17 Handwriting samples taken from the defendant
18 were conceded by him. It was further stipulated
19 that the defendant's brother-in-law, Martin Lauffer,
20 residing at 1627 45th Street, Brooklyn, New York,
21 between April, 1971 and December, 1972. The Govern-
22 ment, of necessity, urges that it has met its burden
23 of proof through circumstantial evidence.

24 Circumstantial evidence is where facts are
25 established from which, in terms of common experience,

1
2 one may logically infer other facts that are sought
3 to be established.

4 By way of example, we are all seated here in
5 this windowless room. We may like to know what the
6 weather is outside. We can't see what it is like
7 but suddenly the door opens and in walks a man and
8 his clothing appears to be wet. Now, you might
9 immediately infer from that fact that it is raining
10 outside at the present time, but you can't be abso-
11 lutely sure of that because there are other
12 possibilities; he was sprinkled by a hose as he
13 walked near the building or someone dumped some water
14 out the window. If he walks into the room with a
15 wet coat and a wet umbrella, then you may infer that
16 it is indeed raining outside.

17 Do you understand? All right.

18 Now, as I said, circumstantial evidence is
19 where facts are established from which, in terms of
20 common experience, one may logically infer other
21 facts that are sought to be established. Circum-
22 stantial evidence, if believed, is of no less value
23 than direct evidence, for in either case, you must
24 be convinced beyond a reasonable doubt of the guilt
25 of the defendant.

1
2 In this case, the Government contends that
3 through the testimony of the handwriting expert,
4 Thomas Donnelly has offered circumstantial evidence
5 that the defendant, posing as Charles Ross or Al
6 Gordon, offered the various credit cards, bearing
7 the latter for signatures and he issued it and used
8 the cards to obtain goods and services in substan-
9 tial amount, most of which have never been paid for.

10 The defendant, relying on his presumption of
11 innocence, urges that the cross-examination of
12 Government witnesses brought out the fact that some
13 payments were made on the credit cards in question,
14 and that this negates the Government's contention
15 that he applied for the credit cards with the in-
16 tent to defraud the issuers and use the name to
17 effectuate such a scheme.

18 I have not adverted to all the evidence upon
19 which the Government and the defendant rely to sup-
20 port their respective positions. All evidence,
21 whether or not I referred to it or counsel had men-
22 tioned in their summation, is important and must be
23 considered by you. In my mentioning of the testi-
24 mony, I have sought to state it accurately. How-
25 ever, if perchance any reference to testimony I have

1
2 made does not agree with your recollection, and
3 I have stated this before, you are to disregard such
4 references by me, and I emphasize this as strongly
5 as words can convey meaning, always it is your re-
6 collection and yours alone that governs, and you
7 must unhesitatingly reject any statement as to a
8 fact which I or counsel have made which does not
9 accord with your own recollection.

10 It must be apparent to you that the versions
11 of the Government and defense are in sharp contro-
12 versy on the key issues of the defendant's intent
13 and that key issues of fact are raised. You are
14 called upon to decide fact issues here. How do you
15 determine where the truth lies.

16 Now, I think you understand right at the
17 start of the trial I suggested that it would be de-
18 sirable and important for you not only to listen but
19 to look at the witnesses as they testify. Your
20 determination of the issue of credibility very
21 largely must depend upon the impression that a wit-
22 ness made upon you as to whether or not he was
23 telling the truth, or giving you an accurate version
24 of what occurred.

25 I often say to jurors, when you walk in the

Charge of the Court

120

1 door of the courtroom and sit in the jury box, while
2 the trial is going on and later when you are de-
3 liberating in the jury room, you have your common
4 sense, your good judgment and your experience with
5 you. You decide whether or not the witness was
6 straightforward and truthful, whether he attempted
7 to conceal anything, whether he has a motive to
8 testify falsely, whether there is any reason why he
9 might color his testimony.
10

11 In other words, what you try to do, to use
12 the vernacular, size a person up just as you would
13 do, as I said before, in any important matter where
14 you are undertaking to determine whether or not a
15 person is truthful, candid and straightforward.

16 In passing upon the credibility of a witness,
17 you may also take into consideration inconsistencies
18 or contradiction as to matters in his own testimony,
19 or any conflict with that of other witnesses. A
20 witness, however, may be inaccurate, contradictory
21 or even untruthful in some respects, and yet in
22 others be entirely credible.

23 The ultimate question for you to pass upon:
24 Did the witness tell the truth here before you as to
25 essential matters?

1
2 The evidence has included the expert testimony
3 of the handwriting analyst -- ordinarily opinions
4 of a witness are not received in evidence. However,
5 opinions of expert witnesses are an exception to the
6 rule. A witness by training and experience is per-
7 mitted to give you his opinion in matters in which
8 he is versed and which is material to the case, and
9 he is permitted also to give you the reasons for and
10 the basis of his opinion.

11 You should weigh and evaluate the testimony
12 of an expert witness precisely as you weigh the
13 testimony of any non-expert witness. Take into
14 account the probability and reasonableness of the
15 matters to which he has testified, the schooling he
16 has had; the learning and standing he has in his
17 calling, or the lack of it, and whether he has had
18 that breadth of experience in the field which would
19 lend weight to his opinion.

20 You should ask yourself is this witness by the
21 standards qualified by training and experience to
22 render valid and reliable opinions on the topics on
23 which he testified? His testimony should be given
24 the weight to which or in such analysis you conclude
25 it is entitled.

1
2 If you conclude the witness is not sufficiently
3 qualified or the basis of his opinion is inadequate,
4 you may reject his testimony.

5 The fact that some Government witnesses were
6 Government employees does not entitle their testi-
7 mony to any greater weight or consideration than that
8 afforded to any other witness in the case. You
9 will evaluate their testimony the same way you do
10 that of any other witness.

11 If you find that any witness wilfully testi-
12 fied falsely as to any material fact, you have a
13 right to reject the testimony of that witness in its
14 entirety, or you may accept that part or portion
15 which commends itself to your belief as credible.

16 Defendant has not testified in this case.
17 That is his absolute right, and no aspect may be
18 considered by you as any evidence against him, or as
19 a basis for any presumption or inference unfavorable
20 to him. You must not permit that fact to weigh in
21 the slightest degree against him or enter into your
22 deliberations or discussions.

23 The guilt or innocence of the defendant on
24 trial before you is for you and you alone to deter-
25 mine on the evidence that is in the case.

1
2 During the course of the trial, the attorneys
3 have objected to certain questions, moved to strike
4 answers and taken under procedural decision before
5 you; these are matters of technical procedure that
6 are proper concern of the attorney and should not
7 concern you. I instruct you, you are not to draw
8 any inferences from the fact that attorneys have made
9 objections and motions before you during the trial
10 and final argument, except for such evidence as I
11 have already specifically instructed you to disregard
12 during the course of the trial.

13 You may consider all testimony and exhibits
14 which have been received in evidence, including the
15 stipulation of fact read to you at the conclusion of
16 the Government's case.

17 The verdict on each count in the indictment
18 must be unanimous. Your function is to weigh the
19 evidence in the case and to determine the guilt or
20 innocence of the defendant solely upon the basis of
21 such evidence, and these instructions.

22 Under your oath as jurors, you cannot allow a
23 consideration of the sentence which may be imposed
24 upon a defendant, if convicted, to enter into your
25 deliberations or to influence your verdict in any

Charge of the Court

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1
2 way. Your duty is to decide the case solely and
3 wholly upon the evidence. In the event of a con-
4 viction, the duty of imposing sentence rests solely
5 upon the Court.

6 Each juror is entitled to his or her own
7 opinion but each should, however, exchange views
8 with his fellow jurors; that is the very purpose of
9 a jury deliberation, to discuss and consider the
10 evidence, to listen to the arguments of fellow
11 jurors, to present your individual view, to consult
12 with one another and to reach an agreement based
13 solely and wholly upon the evidence, if you can do
14 so without violence to your own individual judgment.

15 Each one must decide the case for himself or
16 herself after consideration with his or her fellow
17 jurors, but you should not hesitate to change an
18 opinion which, after discussion with your fellow
19 jurors, appears erroneous.

20 If, after considering all the evidence and
21 the arguments of your fellow jurors, you entertain
22 a conscientious view that differs from others, you
23 not to yield your judgment simply because you are
24 outnumbered or outweighed. Your final vote must
25 reflect your conscientious view as to how the issue

1 should be decided.

2
3 Now, since there are, as I said, these
4 multiple counts in the indictment, I have prepared a
5 form of verdict as a guide, listing the counts I read
6 off to you by number; that is, by credit card, date
7 and name used and the date. This will be handed to
8 your foreman and on each one it says guilty or not
9 guilty, as the case may be; and when you have arrived
10 at a vote one way or the other as to one or more of
11 these, then your foreman will record it.

12 If it is unanimous, the foreman will simply
13 place an X in the appropriate column.

14 Now, I come to one final task I always ap-
15 proach with reluctance. I understand our remaining
16 alternate, Mr. Cox, sat patiently during the trial,
17 somewhat lengthy trial. Now the time has come that
18 I must separate you from your brethren because you
19 have performed your function by being here just as
20 case. I thank you and you leave with the apprecia-
21 tion of the Court and you may do so now, if you
22 wish.

23 Now, those of you who will decide the case
24 will shortly retire to the jury room where the door
25 will be guarded by one of our faithful marshals.

1 It is important that no one gets through that door.

R7 2 If during the course of your deliberation,
3 it becomes necessary for you to communicate with the
4 Court, you do so by note written by one of you or by
5 your foreman, and I must say that my custom, Juror
6 No. 1 is your foreman, and, of course, that note
7 will be transmitted to the Court and will speak with
8 counsel out of your presence. If it is a request
9 for information or anything, we will advise you
10 after we have had that consultation.
11

12 Now, when you retire to deliberate, the
13 various exhibits will be gathered up and made avail-
14 able to you in the jury room if it becomes necessary,
15 and I underscore the word "necessary." You may re-
16 quest to have portions of the testimony read to you,
17 that would mean we would have to get the particular
18 reporter back here who took the transcription on
19 the tape, and he'll have to read it back from that
20 since there is no written transcript in this case,
21 but I do not wish you to be deterred by that. I
22 simply say it will take time to find the reporter
23 and to find the particular portion that you may want
24 read back, but if it is necessary, it will be done.

25 Has Mr. Cox left?

1 Swear the marshals.

2 (At this point, two marshals were sworn by
3 the Clerk of the Court.)

4 (Whereupon, a sidebar conference was held.)

5 THE COURT: I want to give you a chance to
6 except to my charge. Is there anything that you
7 want noted on the record in that respect?

8 MR. LAZARUS: Yes, I do, your Honor.

9 First with respect to circumstantial evidence.
10 The Court charged on circumstantial evidence. I
11 would ask that your Honor expand the charge that you
12 gave on circumstantial evidence to the effect that
13 circumstantial evidence must be sufficiently strong
14 to exclude every reasonable theory of innocence;
15 that is, the evidence must be inconsistent with any
16 reasonable hypothesis of innocence.

17 If circumstantial evidence is susceptible
18 of two constructions, each of which appears to be
19 reasonable and only one of which points to the guilt
20 of the defendant, it is the duty of the jury to
21 adopt the interpretation that will admit the de-
22 fendant's innocence and reject that which points to
23 his guilt.

24 THE COURT: Mr. Kinelman.

25 MR. LAZARUS: I could give you the citation.

1 THE COURT: I will apply the rule of this
2 Circuit and deny your request.

3 MR. LAZARUS: I have one further. I would
4 ask that your Honor expand on his instruction on
5 reasonable doubt, and that the jury be instructed
6 that a reasonable doubt exists whenever, after
7 careful and impartial consideration of all of the
8 evidence in the case, the jurors do not feel a moral
9 certainty that the defendant is guilty of the charge.

10 THE COURT: Again I feel myself bound by the
11 rules of the Second Circuit, which does not accept
12 that qualification on reasonable doubt.

13 MR. LAZARUS: All right, I respectfully
14 except.

15 MR. KIMELMAN: I may add as to the Government,
16 perhaps the Court could charge in reference to
17 Government's Exhibit 25.

18 THE COURT: What's 25? You really flatter
19 my recollection powers.

20 MR. KIMELMAN: 25 and 25-A, which was the
21 jacket that was entered as a business record with
22 all the notations. I would ask that although the
23 Court gave limiting instructions at the time the
24 evidence was admitted, certainly it would not hurt
25 to repeat the business record exception to the

1 hearsay rule.

2 THE COURT: I had said that they may consider
3 all the evidence now before them, and how it got
4 there doesn't seem to matter much at this point.
5 I believe it is just going to complicate matters so
6 I will deny that request for the time being.

7 MR. LAZARUS: I had a few more brief ones.

8 THE COURT: Go ahead.

9 MR. LAZARUS: I would ask your Honor to ex-
10 pand on the question of intent and instruct the jury
11 that the mailings must have been for the specific
12 purpose of executing a fraud.

13 THE COURT: I thought I made that pretty clear.
14 That's what I thought I said; that the act of using
15 United States mails was done wilfully and with
16 specific intent to carry out some essential -- ex-
17 cept in the execution of the said scheme or artifice
18 to the fraud or attempt to do so.

19 MR. LAZARUS: I think some essential didn't
20 spell it out. There is only one purpose in the
21 mail letter, to obtain credit, and that the intent
22 to defraud, the scheme existed at the time the
23 application for credit was made.

24 In other words, an attempt not to pay at
25 the time the credit was sought.

1 THE COURT: This defendant devised a scheme
2 or artifice to defraud. This was one of the things
3 that must be proved first by obtaining the use of
4 the credit card by -- et cetera, et cetera -- all
5 with the intent of using such cards when received
6 to obtain goods or services without payment therefor.

7 MR. LAZARUS: All right, your Honor.

8 THE COURT: I think that covers it.

9 MR. LAZARUS: I request that it be given in
10 this form, if I may.

11 THE COURT: I will deny that request as
12 covered in substance, if not in fact.

13 MR. LAZARUS: Respectfully except.

14 THE COURT: Now, I guess we wait.

15 (The court stood in recess.)

16 (Court resumed at 5:45 p.m.)

17 THE COURT: I have been handed a note that
18 the jury has arrived at a verdict.

19 THE CLERK: Jury's note marked Court Exhibit
20 No. 1.

21 (So marked.)

22 THE COURT: Bring in the jury.

23 (The jury entered the courtroom and are now
24 seated in the jury box.)

25 THE COURT: Members of the jury, I received

JUDGMENT AND COMMITMENT (Filed March 14, 1975)

33a

United States of America vs.

United States District Court for

Eastern District of New York

DEFENDANT

MICHAEL ZILBERBERG

DOCKET NO.

74 CR 375

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this dateMONTH DAY YEAR
3 14 1975

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Robert Lazarus, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTY

N' FILMED

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY. cts. 2, 5, 8, 9, 10, 12, 13, 15, 18, 21, 22, 23, 25
and 26FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C. Secs. 1341 and 1342, in that on or about and between April 1, 1971 and Dec. 1, 1972, the defendant, knowingly and wilfully devised a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, from various companies and banks issuing credit cards without revealing his true name and falsely using the name of another as the purported applicant for the aforementioned credit cards

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE
OR
PROBATION
ORDER

IT IS ADJUDGED that on counts 2, 5, 8, 9, 10, 12, 13, (18 U.S.C. 1341) the defendant is sentenced to 3 years probation concurrent on each count and consecutive to the sentence imposed on remaining counts below. On counts 15, 18, 21, 22, 23, 25 and 26 (18 U.S.C. Sec. 1342) the defendant is sentenced to 1 year imprisonment on each count to run concurrently

SPECIAL
CONDITIONS
OF
PROBATIONADDITIONAL
CONDITIONS
OF
PROBATIONCOMMITMENT
RECOMMEN-
DATION

SIGNED BY

☐ U.S. District Judge☐ U.S. MagistrateFILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

MAR 14 1975

TIME AM.....
PM.....

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Howard R. Neaher

Date

3-14-75

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

MICHAEL ZILBERBERG,

Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF New York

ss.:

Eugene L. St. Louis

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

~~XXXX~~ 1235 Plane St., Union, N.J. 07083That upon the 28th day of April 19 75, deponent served the annexed *Appendix*

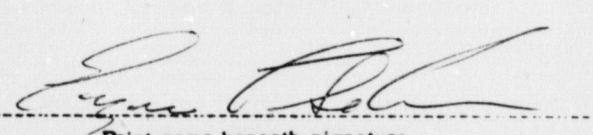
upon David G. Trager

attorney(s) for

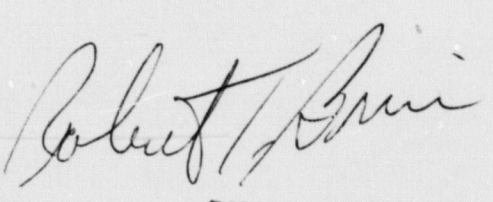
Appellee

in this action, at 225 Cadman Plaza, Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 28th
day of April 19 75
Print name beneath signature

Eugene L. St. Louis


ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0110950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1978
1977